

**Vong Siaw Yung & Anor v Lieng Teck Agriculture Sdn Bhd**

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HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12BNCvC-1/4  
OF 2015

ALWI ABDUL WAHAB JC

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11 AUGUST 2015

*Contract — Agreement — Sale and purchase — Purchase of pigs — Agreement that actual number of pigs loaded to truck and original number of pigs under sale and purchase agreement will be determined, calculated and paid accordingly based on price list — Claim for balance of payment — Whether claim frivolous and vexatious*

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The plaintiffs and the defendant had entered into a sale and purchase agreement ('SPA') whereby the plaintiffs agreed to sell and the defendant agreed to buy 3,469 pigs at the total consideration of RM1,130,330. Under cl 5 of the SPA, the parties agreed that once all the pigs have been moved to the defendant's farm, the differences between the actual number of pigs loaded to the truck and the original number of pigs under the SPA will be determined, calculated and paid accordingly based on the price list given by the plaintiffs to the defendant. The plaintiffs claimed for a balance payment of RM241,727.68 unpaid by the defendant for the purchase of 3,282 pigs ('the original claim'). In the original claim, it was stated that the defendant had proposed and the plaintiffs had agreed on the price list although the size of the pigs were increased from 45kg to 50kg and 80kg to 100kg in the above price list. By their amended statement of claim, the plaintiffs alleged that the defendants took delivery of 3,740 pigs and the total claim was RM1,430,330. The sessions court judge ('SCJ') dismissed the plaintiffs' claim of RM445,010 on the basis that the claim was frivolous and vexatious and allowed the defendant's counterclaim. The SCJ was of the view that all suckling piglets as piglets in the farrowing pen and should be given free of charge to the defendant under the SPA. Hence, the plaintiffs appeal. The plaintiffs submitted that the SCJ erred in her findings when she failed to consider the delivery orders and invoices in the agreed bundle of documents in assessing the plaintiffs' claim.

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**Held**, dismissing the appeal with costs of RM10,000:

- (1) When all the 39 invoices were delivered to the defendant in one go as attachments to the plaintiffs' letter demanding the sum of RM471,415 allegedly owed by the defendant, it ran counter against the clear wording

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- A of cl 4 of the SPA. The dispute by the defendant on these invoices was not a surprise due to the irregularity in the mode of issuing them contrary to cl 4 of the SPA. By issuing the invoices in September 2008, not at the time when the pigs were loaded onto each truck in May 2008, the exact number of pigs could not be ascertained due to loss of human memory as
- B four months had lapsed. Further, the invoices have to be counter signed by the plaintiffs to confirm the correct number of pigs loaded onto each truck. Surely this cannot be done if the invoices were delivered in bulk four months later after the pigs were delivered and loaded onto the truck. The SCJ was therefore correct in her decision in giving less weight on the
- C invoices although they were exhibited and found in the agreed bundle of document (see para 16).
- (2) There was no fault of the SCJ on her findings of fact that the plaintiffs' evidence was devoid of any reasonable explanation on the different amount of figures for the purchase of pigs by the defendant. As regards to
- D the number of pigs, it was the defendant's contention that the number of pigs loaded onto the truck was 3,282 pigs. It was stated in the uncategorised term that the number of pigs delivered to the defendant was 3,282. This is all the more reason why the material witness should be
- E called and to testify as witness for the plaintiffs to explain this uncertainty in respect of the amount of claim and the number of pigs delivered to the defendant as he was responsible for the filing of the original claim. This was a proper situation for the court to invoke s 114(g) of the Evidence Act 1950 and the SCJ could not be faulted in doing that based on her
- F evaluation of the evidence (see para 22).
- (3) The issue whether the suckling piglets were to be given free or otherwise was the cause of the dispute relating to the actual number of pigs that have been delivered and supplied. The pigs were particularised as
- G 'suckling piglets' with no price quoted. Compared to the remarks of the Schedule to cl 1 of the SPA where the supply of pigs to the defendant would include all the 'suckling piglets in the farrowing pens', it was therefore correct for the defendant to treat that all the suckling piglets totaling 458 were to be given free as all these piglets were inclusive in the supply as per the Schedule to cl 1 of the SPA (see paras 31, 34 & 37).

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**[Bahasa Malaysia summary]**

Plaintif dan defendan telah memasuki perjanjian jual beli ('PJB') yang mana plaintiff bersetuju untuk menjual dan defendan bersetuju untuk membeli 3,469 ekor khinzir atas keseluruhan balasan RM1,130,330. Di bawah klausa PJB, pihak-pihak bersetuju bahawa apabila kesemua khinzir telah dipindahkan ke ladang defendan, perbezaan antara angka sebenar khinzir yang dimuatkan di trak dan angka asal khinzir akan ditentukan, dikira dan dibayar sewajarnya berdasarkan senarai harga yang diberikan oleh plaintiff kepada defendan. Plaintiff menuntut untuk baki bayaran RM241,727.68 yang tidak dibayar oleh

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defendan untuk pembelian 3,282 ekor khinzir ('tuntutan asal'). Dalam tuntutan asal, adalah dinyatakan bahawa defendan telah mencadangkan dan plaintif bersetuju kepada senarai harga walaupun saiz khinzir telah dinaikkan daripada 45kg kepada 50kg dan 80kg kepada 100kg dalam senarai harga di atas. Melalui pindaan pernyataan tuntutan mereka, plaintif mendakwa bahawa defendan telah menghantar 3,740 ekor khinzir dan jumlah tuntutan adalah RM1,430,300. Hakim mahkamah sesyen ('HMS') menolak tuntutan plaintif sebanyak RM445,010 atas dasar tuntutan adalah remeh dan menyusahkan dan membenarkan tuntutan balas defendan. HMS berpendapat bahawa semua anak khinzir yang menyusu sebagai khinzir dalam seperinduk anak khinzir dalam kandang dan perlu diberikan secara percuma kepada defendan di bawah PJB. Maka, rayuan plaintif. Plaintif berhujah bahawa HMS terkhilaf dalam dapatannya apabila beliau gagal mengambil kira pesanan penghantaran dan invois dalam ikatan dokumen yang dipersetujui dalam menilai tuntutan plaintif.

**Diputuskan,** menolak rayuan dengan kos sebanyak RM10,000:

- (1) Apabila kesemua 39 invois dihantar kepada defendan sekali gus sebagai lampiran kepada surat plaintif menuntut jumlah sebanyak RM471,415 yang dikatakan terhutang oleh defendan, ia bertentangan terhadap kata-kata yang jelas klausa 4 PJB. Pertikaian oleh defendan pada invois ini tidak mengejutkan kerana ketidakteraturan dalam mod mengeluarkannya bertentangan dengan klausa 4 PJB. Dengan mengeluarkan invois pada September 2008, tidak pada masa yang apabila khinzir itu dimuatkan ke dalam setiap trak pada Mei 2008, jumlah sebenar khinzir tidak dapat dipastikan disebabkan kehilangan ingatan manusia kerana empat bulan telah luput. Di samping itu, invois perlu ditandatangani oleh plaintif untuk mengesahkan jumlah khinzir yang betul dimuatkan ke dalam setiap trak. Sesungguhnya ini tidak boleh dilakukan jika invois telah dihantar secara pukal empat bulan kemudian selepas khinzir itu dihantar dan dimuatkan ke dalam lori. HMS oleh itu betul dalam keputusannya dalam memberikan kurang berat pada invois walaupun ia telah diekshibitkan dan didapati dalam ikatan dokumen yang dipersetujui (lihat perenggan 16).
- (2) Tiada kesilapan HMS atas dapatan faktanya bahawa keterangan plaintif adalah tidak mempunyai apa-apa penjelasan munasabah pada perbezaan jumlah angka untuk pembelian khinzir oleh defendan. Berkenaan dengan angka khinzir, adalah hujahan defendan bahawa jumlah khinzir yang dimuatkan ke dalam trak adalah 3,282 ekor khinzir. Ia dinyatakan dalam terma yang tidak dikategorikan bahawa jumlah khinzir yang

- A dihantar kepada defendan adalah 3,282. Ini adalah lebih sebab mengapa saksi material sepatutnya dipanggil dan memberi keterangan sebagai saksi plaintif untuk menjelaskan ketidakpastian ini berkenaan dengan jumlah tuntutan dan jumlah khinzir dihantar kepada defendan memandangkan dia bertanggungjawab untuk memfailkan tuntutan asal.
- B Ini adalah situasi yang wajar untuk mahkamah menggunakan s 114(g) Akta Keterangan 1950 dan HMS tidak boleh terkhilaf dalam melakukan itu berdasarkan penerangannya terhadap keterangan (lihat perenggan 22).
- C (3) Isu sama ada anak khinzir yang menyusu diberi secara percuma atau sebaliknya adalah punca pertikaian berkaitan dengan jumlah sebenar khinzir yang telah dihantar dan dibekalkan. Khinzir dispesifikasikan sebagai 'suckling piglets' tanpa sebut harga. Berbanding dengan kenyataan Jadual kepada klausa 1 PJB yang mana bekalan khinzir kepada defendan akan termasuk kesemua 'suckling piglets in the farrowing pens',
- D adalah oleh itu betul untuk defendan menganggap kesemua anak khinzir berjumlah 458 adalah diberikan percuma kerana kesemua anak khinzir termasuk di dalam bekalan seperti Jadual kepada klausa 1 PJB (lihat perenggan 31, 34 dan 37).]
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#### Notes

For cases on sale and purchase, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3323–3327.

#### F Cases referred to

*Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33, SC (refd)

*Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127, HC (refd)

#### G Legislation referred to

Evidence Act 1950 ss 91, 92, 114(g)

*Daniel Lee (HC Lee & Partners Advocates) for the appellant.*

#### H *KC Wong (KC Wong & Assoc) for the respondent.*

#### Alwi Abdul Wahab JC:

#### INTRODUCTION

- I [1] This is an appeal by the appellants ('the plaintiffs') against the decision of the learned sessions court judge ('SCJ') made after a full trial and given on the 23 March 2015 in dismissing the plaintiffs' claim and in allowing the respondent's ('the defendant') counterclaim.

## THE FACTS

[2] The plaintiffs and the defendant had entered into a sale and purchase agreement dated 25 March 2008 ('SPA') whereby the plaintiffs agreed to sell and the defendant agreed to buy the pigs (3,469 pigs) at the total consideration of RM1,130,330 subject to the terms and conditions as stated in the SPA.

[3] Under cl 5 of the SPA, parties agree that once all the pigs have been moved to the defendant's farm, the differences between the actual number of pigs loaded to the truck and the original number of pigs (ie 3,469) under the SPA will be determined, calculated and paid accordingly based on the price list given by the plaintiffs to the defendant.

[4] By a letter dated 10 June 2009 from M/s Ernest Chua & Co (the plaintiffs' previous advocates) to the defendant, it was agreed that the price list for the actual number of pigs loaded into the truck according to size were determined as follows:

- (a) for each porker from 7kg–45kg be valued at RM260;
- (b) for each porker from 50kg–80kg be valued at RM390; and
- (c) for each breeder be valued at RM800.

[5] By the plaintiffs' statement of claim dated 29 June 2009, the plaintiffs' claim for a balance payment of RM241,727.68 unpaid by the defendant for the purchase of 3,282 pigs ('original claim'). At para 8 of the original claim, it was stated that the defendant had proposed and the plaintiffs had agreed on the price list mentioned above although the size of the pigs were increased from 45kg to 50kg and 80kg to 100kg in the above price list at para 4 of this judgment. The plaintiffs' claim of RM241,727.68 in the original claim was made up and calculated as follows:

|                                    |                   |
|------------------------------------|-------------------|
| The total price of 3,282 pigs      | = RM1,214,400     |
| Less the sum paid by the defendant | = RM985,320 (-)   |
| Total remaining payable            | = RM229,080       |
| Added interest charge              | = RM12,647.68 (+) |
|                                    | <hr/>             |
|                                    | = RM241,727.68    |

[6] By their amended statement of claim dated 14 May 2013 ('amended claim'), the plaintiffs alleged that the defendants took delivery of 3,740 pigs and the total claim was RM1,430,330 (as per Schedule 1 and Schedule 2 of the amended claim at pp 4–13 of the record of appeal Vol 1).

**A** [7] Under the amended claim, the plaintiffs are claiming RM445,010 for the unpaid balance of the purchase price of the 3,740 pigs and calculated as follows:

The total of the price of = RM1,430,330  
3,740 pigs

**B** Less the sum paid by the = RM985,320 (-)  
defendant

Total remaining payable = RM445,010

**C** [8] The learned SCJ dismissed the plaintiffs' claim of RM445,010 on the basis that the claim is frivolous and vexatious and allowed the defendant's counterclaim. Hence, the plaintiffs' appeal.

**D** THE LEARNED SCJ'S DECISION

**E** [9] The learned SCJ ruled that the number of pigs supplied by the plaintiffs listed under Schedule 1 and 2 of the plaintiffs' amended claim for the remaining sum of RM445,010 are misconceived as the plaintiffs had failed to establish their claim which is inconsistent with the terms and conditions under the SPA.

**F** [10] The learned SCJ had taken a view that the plaintiffs were uncertain with their claim as they have failed to give detailed particulars of five different amounts of claim made against the defendant.

**G** [11] The learned SCJ had ruled that failure of the plaintiffs to call Mr Ernest Chua of M/s Ernest Chua & Co (the plaintiffs' previous advocates) to testify and to substantiate the plaintiffs' claim would invite the invocation of s 114(g) of the Evidence Act 1950 against the plaintiffs.

**H** [12] The learned SCJ was of the view that all suckling piglets as piglets in the farrowing pen and should be given free of charge to the defendant under the SPA.

THE APPEAL

**I** [13] Learned counsel for the plaintiffs submitted that the learned SCJ was erred in her findings when she failed to consider the delivery orders and invoices in the agreed bundle of documents in assessing the plaintiffs' claim. On invoices, this is what the learned SCJ said:

Further, on the said 39 invoices stated in the letter dated 3 September 2008 are found at p 49 of Agreed Bundle C, whereby the plaintiffs informed the defendant that the outstanding balance of the purchase price due is RM471,415 and enclosed 39 copies of invoices for the total sum of RM1,417,915 being the selling price of the pigs. These 39 invoices were disputed by the defendant via letter dated 17 September 2008 found at pp 21–22 of Bundle F (exh P9). PW4 testified that the plaintiffs did not agree to the price list that shown in the letter exh P9 and the number of pigs which categorised in Item 1, 2 and 3 at p 22 of Bundle F (p 328 of the appeal record Vol 11).

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[14] Learned counsel for the defendant pointed out that these 39 invoices were received as enclosures to the plaintiffs' letter dated 3 September 2008 despite the fact that the pigs were totally loaded and delivered on 5 May 2008. Learned counsel further submitted that these invoices were disputed by the defendant's previous advocates M/s Wong Orlando Chua vide their letter dated 17 September 2008. The invoices were never identified nor tendered at the trial in the sessions court. The learned counsel for the defendant referred to the evidence of Richard Law Fung King (PW4) of M/s Sentosa Advocates and Solicitors who was the previous counsel acting for the plaintiffs during cross-examination pertaining to this issue:

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Q: The first part of the 4th payment under the Sales and Purchase Agreement was made in June 2008. The pigs were totally loaded in Sibul since 5.5.2008. Refer to page 49 of Bundle C. In your letter dated 3.9.2008, the Plaintiff only purported to send the 39 copies of the invoices in September 2008 as enclosed in your letter, correct?

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A: Yes

Q: Am I also correct that Wong Orlando Chua and Kuok Advocates acting for the defendant disputed the said invoices via their letter dated 17.9.2008 (refer to page 21 of Bundle F), correct?

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A: Yes

(Notes of proceedings at pp 174–175 of the appeal record Vol 1)

[15] On the issue of invoice, cl 4 of the SPA is relevant. It says:

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A delivery order/invoice will be issued to the said Seller stating the number of pigs loaded onto each truck and will duly be counter signed by the said Seller and/or his authorized personnel or representative(s).

Based on the above cl 4, it is patently clear that the delivery order or invoices will have to be issued to the defendant to indicate the number of pigs at the time when the pigs were loaded onto each truck. The delivery order or invoices will also have to be counter signed by the seller ie the plaintiffs.

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**A** [16] In the instant case, when all the 39 invoices were delivered to the defendant in one go as attachments to the plaintiffs' letter dated 3 September 2008 demanding the sum of RM471,415 allegedly owed by the defendant, it runs counter against the clear wording of cl 4 of the SPA. The dispute by the defendant on these invoices was not a surprise due to the irregularity in the

**B** mode of issuing them contrary to cl 4 of the SPA. By issuing the invoices in September 2008 not at the time when the pigs were loaded onto each truck in May 2008 the exact number of pigs could not be ascertained due to loss of human memory as four months had lapsed. Further the invoices have to be counter signed by the plaintiffs to confirm the correct number of pigs loaded

**C** onto each truck. Surely this cannot be done if the invoices were delivered in bulk four months later after the pigs were delivered and loaded onto the truck. The learned sessions court judge was therefore correct in her decision in giving less weight on the invoices although they were exhibited and found in the agreed bundle of document.

**D** [17] Learned counsel for the plaintiffs also grounded his appeal by saying that the learned SCJ has made a big issue on the earlier claims of different amounts made by the plaintiffs. Thus, the plaintiffs submit that the learned SCJ failed to appreciate that there was a dispute between the parties arising

**E** from the SPA and these different figures arose in the course of negotiation between the plaintiffs and the defendant.

[18] In this respect, the learned SCJ in her grounds of judgment said this:

**F** When asked to explain how come for one single transaction with the loading of pigs was already completed since 5 May 2008 that the plaintiffs can demand for five different figures namely RM471,417 on the 3 September 2008, RM570,695 on the 3 November 2008, RM218,480 on 20 May 2009, RM229,010 on 10 June 2009 and a claim for RM445,010 in the present suit when the transaction was already finalised on the 5 May 2008. PW4 answered 'because they are pure calculation'

**G** which he said in re-examination means it should be based on the 39 invoices (pp 325–326 (para 35) of the appeal record Vol 1).

The learned SCJ further said at pp 328–329 (para 40) of the appeal record Vol 1 as follows:

**H** The Plaintiffs namely PW1 did not give the details and or reasons for the five (5) different figures namely RM 471,417 on the 3.9.2008, RM 570,695 on the 3.11.2008, RM 218,480 on 20.5.2009, RM 229,010 on 10.6.2009 and a claim for RM 445,010 in the present suit. When put to PW1 that this claim for RM445,010 is baseless and unfounded for the reasons that his solicitors M/s Ernest Chua &

**I** Company only demand RM 241,727.68 in his letter dated 10.6.2009, PW1 only reply saying 'I disagree'.

[19] No doubt that the present claim is RM445,010 based on the amended claim for the balance unpaid by the defendant in respect of 3,740 pigs alleged to be delivered. However, there were also different amounts claimed by the plaintiffs for the purchase of the pigs albeit by two different solicitors acting for them. The court in assessing the plaintiffs' claim should be apprised by these series of claim and how they came about which finally ended with the present amount of RM445,010 as per the amended claim. The learned SCJ has found that the first plaintiff (PW1) and PW4 could not reasonably explained the reason for these five different figures. As the plaintiffs failed to discharge this burden of proving their claim, I can't fault the learned SCJ from her finding that the plaintiffs' claim was frivolous and vexatious.

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[20] From the evidence adduced in the trial court, M/s Sentosa Advocates for the plaintiffs had issued three letters dated 10 July 2008 (exh P6), 3 September 2008 and 3 November 2008 (exh P7) to the defendant, claiming the sum of RM183,500, RM471,415 and RM570,695 respectively. The second advocates for the plaintiffs ie M/s Ernest Chua & Co had also issued two letters of demand both dated 20 May 2009 and 10 June 2008 claiming the sum of RM218,480 and RM229,080 respectively.

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[21] On 29 June 2009, M/s Ernest Chua then proceeded to file the original claim claiming the sum of balance payment of RM241,727.68 (RM229,080 plus interest of RM12,647.68) unpaid by the defendant for the purchase of 3,282 pigs. Paragraph 7 of the original claim clearly states that the defendant took delivery of 3,282 pigs which are particularised accordingly at p 10 of the appeal record Vol 1. The evidence of PW3 (PW1's daughter) on the five different figures and the amount of pigs delivered to the defendant was illuminating and worth to be scrutinised. This is because the plaintiffs' claim should be based on the number of pigs that were actually delivered. Now PW3 said she worked out on the five different figures of claim in May 2009 including the claim of RM445,010 in the present suit which is based on number of pigs ie 3,740 pigs (as per Schedule 1 and 2 of the amended claim). If there was any truth in PW3's evidence why there was a claim for 3,282 pigs and not 3,740 pigs in the original claim on 29 June 2009 when the calculation was worked out by her in May 2009. At this point, it would be sufficed to refer to the analysis of PW3's evidence by the learned SCJ:

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Despite PW3's admission of preparing the calculation in May 2009, but still when the summons was filed in court on 29 June 2009, para 7 of the statement of claim stated that more or less on 5 May 2008 the defendant completely took delivery of all the pigs in the said pig farm totalling 3,282. No explanation as to why the figure 3,282 was mention and not 3,740 pigs when the summons was filed on the 29 June 2009. If PW3's calculation is to be accepted then why it was not incorporated in the statement of claim that was filed on 29 June 2009 to reflect 3,740 pigs loaded onto truck as at 5 May 2008 and the amount due to be RM445,010? No explanation by the plaintiffs in evident in court (p 329 (para 41) of the appeal record Vol 1).

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- A [22] Again, I find no fault of the learned SCJ on her findings of fact that the plaintiffs' evidence was devoid of any reasonable explanation on the different amount of figures for the purchase of pigs by the defendant. As regards to the number of pigs, it was the defendant's contention that the number of pigs loaded onto the truck was 3,282 pigs. M/s Ernest Chua advocates in their
- B original claim dated 29 June 2009 had stated in uncategorised term that the number of pigs delivered to the defendant was 3,282 and particularised in para 7 of the original claim (p 10 of the appeal record Vol 1). This is all the more reason why Mr Ernest Chua of M/s Ernest Chua & Co should be called and to testify as witness for the plaintiffs to explain this uncertainty in respect of the
- C amount of claim and the number of pigs delivered to the defendant as he was responsible for the filing of the original claim. In my view, this is a proper situation for the court to invoke s 114(g) of the Evidence Act 1950 and the learned SCJ could not be faulted in doing that based on her evaluation of the evidence (*Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ
- D 33).

- [23] The present claim of RM445,010 only arises on 14 May 2013 when the original claim was amended by the present advocates ie HC Lee & Partners who is acting for the plaintiffs. Apparently, this balance sum of RM445,010
- E unpaid was calculated based on the total amount of plaintiffs' claim of RM1,430,330 for the total number of 3,740 pigs. The amount of claim for the total number of 3,740 pigs was derived from Schedule 1 and Schedule 2 of the amended claim dated 14 May 2013.

- F [24] Scheduled 1 of the amended claim (p 9 of the appeal record Vol 1) shows that there were 2,683 pigs with the total purchase price of RM843,915. This Schedule 1 of the amended claim is stated by the plaintiffs as number of pigs categorised under cl 1 of the SPA. Schedule 2 of the amended claim (p 10
- G of the appeal record Vol 1) shows there were 1,057 pigs delivered to the defendant for the price of RM586,415. This Schedule 2 of the amended claim is stated by the plaintiffs to be fallen in the category of number of pigs not under cl 1 of the SPA. Learned counsel for the defendant submitted that what the plaintiffs attempted to do in categorising the number of pigs into Schedule 1 and 2 of the amended claim is contrary to ss 91 and 92 of the Evidence Act 1950. For ease of reference, the Schedule to cl 1 of the SPA is reproduced as
- H follows:

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| Schedule to Clause 1 of the SPA                                                                             |                                                |             |
|-------------------------------------------------------------------------------------------------------------|------------------------------------------------|-------------|
| No.                                                                                                         | Types of pigs                                  | No. of pigs |
| 1                                                                                                           | 7kg–45kg Porkers                               | 1,151       |
| 2                                                                                                           | 50kg–80kg Porkers                              | 1,938       |
| 3                                                                                                           | Lactating sows in the farrowing pens           | 25          |
| 4                                                                                                           | Sows about to give birth in the farrowing pens | 45          |
| 5                                                                                                           | Mated sows                                     | 162         |
| 6                                                                                                           | New gifts (small and medium)                   | 148         |
| TOTAL                                                                                                       |                                                | 3,469       |
| ALSO INCLUDE: All the suckling piglets in the farrowing pens and the unborn piglets in the mated sows womb. |                                                |             |

[25] The comparison between Schedule to cl 1 of the SPA and Schedule 1 of the amended claim revealed the whole world of difference. Both Schedule 1 and Schedule 2 as per the amended claim are not something which were agreed according to the terms and conditions of the SPA. Schedule 2 of the amended claim brought in a different price lists contrary to the price list which had been proposed and accepted by defendant and the plaintiffs (as per M/s Ernest Chua & Co's letter dated 10 June 2009 and para 8 of the original claim). The learned SCJ cannot be blamed for agreeing with the defendant and I am too for one agree with the defendant's submission that the plaintiffs should not be allowed to bring in any new evidence outside the perimeter of what had been agreed according to the terms and condition of the written SPA (*Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127).

[26] Learned counsel for the plaintiffs submitted that the issue of pigs gained weight during the period between the signing of SPA and the final delivery of pigs on 5 May 2008 while in the care of the defendants ought not to have clouded the mind of the learned SCJ because whichever sized the pigs were they were only counted and determined once the pigs was uploaded to the truck for transportation to the defendant's farm.

[27] As per cl 5 of the SPA, the purpose of the price list was to determine and calculate the differences between the actual number of pigs loaded onto the trucks and the number given and stipulated under Schedule to cl 1 of the SPA. There was nothing in cl 5 of the SPA to provide that the weight of the pigs would be calculated and determined according to the price list. However, the fact that the pigs gained weight while in the care of the defendant based on cl 8(iv) of the SPA and the agreement reached out between the plaintiffs and the defendant on the price list based on weight of the pigs (Ernest Chua & Co's letter dated 10 June 2009) and stated in para 8 of the original claim cannot be ignored.

A [28] Hence, based on the price list, the learned SCJ concluded that there were in fact surplus and short delivery of the pigs according to the size agreed to be delivered under Schedule to cl 1 of the SPA. Under Schedule to cl 1 of the SPA, the number of pigs in the category 7–45kg agreed to be supplied was 1,151 pigs but the actual delivery based on delivery order was 1,684 pigs, a surplus of 533 pigs. For the category of 50–80 kg, the number of pigs agreed to be supplied under the Schedule to cl 1 of the SPA was 1938 but the actual number of pigs delivered based on the delivery order was 1,224, a short supply of 714 pigs. Based on the price list provided under para 8 of the original claim, the learned SCJ came to a finding that the price for the surplus delivery of 533 pigs (7–45kg) was RM138,580 and the price for short deliveries of pigs (50–80kg) and breeder were RM278,460 and RM4,800 respectively which I have no reason to disagree and calculated as follows:

D (i) Surplus Delivery (extra delivery for = 533 pigs 7–45kg)  
Price for each pig under this category = RM260  
Total Price = RM260 x 533 pigs = RM138,580.00 (to be paid by the Defendant to the Plaintiffs)

E (ii) Short Delivery (for category 50–80kg) = 714 pigs  
Price for each pig under this category = RM390  
Total Price = RM390 x 714 pigs = RM278,460.00 (to be paid by the Plaintiffs to the Defendant)

F (iii) Short delivery of 6 Breeder (RM800 for each breeder)  
Total price = RM800 x 6 = RM4800 (to be paid by the Plaintiffs to the Defendant) .

H [29] The learned SCJ then came to a conclusion that the defendant need not come up with any more payment as the total payment of RM985,320 made by the defendant had fully settled the plaintiffs' claim of RM1,130,000 (in the original claim) bearing in mind the price of the surplus and the short delivery of pigs which she calculated them as follows:

$$(RM1,130,000 + RM138,580) - RM278,460 - RM4,800 = RM985,320$$

I [30] I agree with the learned SCJ's conclusion above. I shall now address on one last important issue raised by the plaintiffs relating to suckling piglets which are not all to be given free of charge but only the suckling piglets in the farrowing pens under Schedule to cl 1 of the SPA.

[31] In my view, the issue whether the suckling piglets were to be given free or otherwise is the cause of the dispute relating to the actual number of pigs that have been delivered and supplied. The plaintiffs claim that there were 3,740 pigs delivered and supplied to the defendant whereas the defendant contended that the number of pigs delivered and supplied were 3,282 pigs. The defendant's case is all these pigs were already counted for with a total price of RM985,320 which excluded the 458 suckling piglets (delivery orders Nos 11,927, 11,945 and 11,914).

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[32] Schedule to cl 1 of the SPA provides for the types of pigs and its quantity that were agreed to be supplied and delivered. It is important to note at the bottom of the Schedule to cl 1, where it stated, 'ALSO INCLUDE: All the suckling piglets in the farrowing pens and the unborn piglets in the mated sows' womb'. This remarks at the bottom of Schedule to cl 1 of the SPA mean the suckling piglets in the farrowing pens are inclusive of the sale and the supply of the pigs to the defendant. In other word they are given for free to the defendant.

C

D

[33] As regards to the number of suckling piglets that were supplied, they were shown in three delivery orders namely 119 small porkers suckling piglets (delivery order No 11,914), 141 suckling piglets (delivery order No 11,927), and 198 pigs suckling piglets (free) (delivery order No 11,945). These delivery orders can be found at pp 166, 66 and 68 respectively in the appeal record Vol 11.

E

[34] Having seen these delivery orders, one must note that in all, the pigs were particularised as 'suckling piglets' with no price quoted. Compare this to the bottom remarks of the Schedule to cl 1 of the SPA where the supply of pigs to the defendant would include all the 'suckling piglets in the farrowing pens'.

F

[35] As submitted by the defendant, reading the Schedule to cl 1 of the SPA in its context, it should mean that all the suckling piglets were included in the supply and they should be given free of charge. I agree with the defendant's submission for the reasons that the delivery order Nos 11,914, 11,927 and 11,945 did not specify whether these suckling piglets were 'suckling piglets in the farrowing pens' or 'suckling piglets not in the farrowing pens'. The Schedule to cl 1 only refer to suckling piglets in the farrowing pens are inclusive and they are to be given free to the defendants. There were no price stated in all these delivery orders except for delivery order No 11,945 which mentioned the 198 suckling piglets were free. However, they were not stated to be 'suckling piglets in the farrowing pens'.

G

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I

[36] There were two invoices issued in respect of delivery orders Nos 11,914 and 11,927. There is no invoice for delivery order No 11,945 as there was no charge for the supply of 198 suckling piglets stated therein. The invoice No

A 59,090 (p 100 of the appeal record Vol 11) for the delivery order No 11,914 described the suckling piglets as small porkers. The invoice No 59,103 (p 124 of the appeal record Vol 11) for the delivery order No 11,927 described the suckling piglets as porkers. Clearly there were discrepancies as to whether the pigs that were supplied were suckling piglets in the farrowing pens or porkers which is vital to the plaintiffs' case in accordance with Schedule to cl 1 of the SPA. There was no explanations to this discrepancies. Although this is not the point taken by the learned SCJ but apparently this is the issue in dispute as to whether the 458 pigs that were supplied under the delivery orders attract the charge or not.

C [37] It is therefore correct for the defendant to treat that all the suckling piglets totaling 458 in the delivery orders Nos 11,914, 11,927 and 11,945 to be given free as all these piglets are inclusive in the supply as per the Schedule to cl 1 of the SPA.

D [38] Now, taking this into account, the defendant submitted the total number of pigs that were claimed to be delivered by plaintiffs was 3,740, minus the total number of suckling piglets ie 458, this equal to 3,282 pigs which were accounted and paid for by the defendant.

E [39] The plaintiffs came in with its amended claim dated 14 May 2013 showing the number of pigs and their pricing in Schedule 1 and Schedule 2. In reference to the three delivery orders that were mentioned previously, one must note the glaring difference in the description of the pigs in Schedule 1 of the amended claim as follows:

F (a) in delivery order No 11,927, the number of pigs supplied were stated to be 13 pigs and described as pregnant sows with a total price of RM10,400 (invoice No 59,103 at p 124 of the appeal record Vol 11). However, the charge under Schedule 1 of the amended claim for these 13 pigs was RM14,300; and

G (b) the suckling piglets in the delivery order No 11,914 and 11,927, were not mentioned under Schedule 1 and 2 of the plaintiffs' amended claim dated 14 May 2013. The absent of these delivery orders goes to support the defendant's claim that these suckling piglets were free and inclusive in the supply.

#### I CONCLUSION

[40] For all the above reasons, I uphold the learned SCJ's decision. The plaintiffs' appeal is hereby dismissed with costs of RM10,000 to the defendant.

*Appeal dismissed with costs of RM10,000.*

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Reported by Afiq Mohamad Noor

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